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No. 90-217

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JUDITH A. BROWN and AMERICAN LIFE LEAGUE, INC.,
Petitioners,
v.
ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN,
WOMEN'S SUBURBAN CLINIC and
NORTHEAST WOMEN'S CENTER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

NANCY J. BREGSTEIN
Counsel of Record
MARY A. MCLAUGHLIN
JEROME M. MARCUS
LORI LOWENTHAL STERN
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 981-2000
Counsel for Respondents

October 12, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether petitioners' Rule 11 motion was properly denied as untimely under a Third Circuit supervisory rule which requires such motions to be made before the entry of final judgment in the district court.

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents respectfully request that the petition for a writ of certiorari be denied.

STATEMENT

1. *The original lawsuit.* In May, 1988, several health clinics in the Philadelphia area, including respondents, learned that they would be the subject of anti-abortion demonstrations and blockades during the week of July 4, 1988. The blockades were organized and executed by an entity called Operation Rescue, along with its individual and group supporters. On June 29, 1988, the clinics filed a complaint seeking declaratory and injunctive relief from the planned actions, and they requested a temporary restraining order ("TRO") and a preliminary in-

junction. Petitioners, who were listed as co-sponsors of Operation Rescue's activities in Operation Rescue literature, were among those named as defendants.

On June 30, 1988, the district court granted a TRO barring the defendants' actions. The demonstrations and blockades were held nonetheless, in violation of the court's order. On December 5, 1988, the district court therefore held Operation Rescue and four individuals in contempt. On March 3, 1989, with respondents' consent, the district court ordered petitioners Brown and ALL, and three other defendants, dismissed with prejudice pursuant to Fed. R. Civ. P. 41(a)(2).

The district court granted permanent injunctive relief against the remaining defendants on March 21, 1989, holding that their activities were unlawful under 42 U.S.C. § 1985(3) and under the common law doctrines of trespass and intentional interference with contractual relations. Because the court's order gave respondents all the relief they had sought in their complaint, they moved voluntarily to dismiss certain remaining counts. The district court granted that motion on April 18, 1989, and entered final judgment on that date. On May 1, 1989, the district court found respondents entitled to attorney's fees as prevailing parties under 42 U.S.C. § 1988, and awarded them over $70,000 in fees and costs. In so holding, the district court expressly found that "[respondents'] counsel in the instant matter obtained superb results * * *." *Roe* v. *Operation Rescue*, 1989 U.S. Dist. LEXIS 4688, *18 (E.D. Pa. May 2, 1989).

2. *The Rule 11 proceedings.* On May 17, 1989, well after final judgment had been entered, petitioners filed a motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure.[1] On June 19, 1989, the district

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[1] Petitioners have quoted an outdated version of Rule 11, see Pet. 2-3, which was in force only until 1987. Compare 2A J. Moore, W. Taggert & J. Wicker, *Moore's Federal Practice* ¶ 11.01[3] (2d

court denied the motion as untimely under a Third Circuit supervisory rule, announced in *Mary Ann Pensiero, Inc.* v. *Lingle*, 847 F.2d 90, 94 (1988), requiring that Rule 11 motions be filed before the entry of final judgment, so that a single appeal can resolve both the merits and any issue concerning sanctions.

The district court also went on, however, to address the Rule 11 motion on its merits. After noting that it was "well acquainted with the litigation and the various parties and their counsel," Pet. App. 7a, the court held, as an alternative ground for its decision, that respondents' conduct did not constitute " 'abusive litigation or misuse of the court's process.' " *Id.* 8a-9a (quoting *Pensiero*, 847 F.2d at 95). On the contrary, the district court stated that "[s]ome of the arguments advanced by [petitioners'] counsel in the instant motions come dangerously close to constituting * * * misuse of the Rule." *Id.* 10a.[2] Petitioners' motion for reconsideration was denied on July 11, 1989.

After deciding that oral argument on petitioners' appeal was unnecessary,[3] the court of appeals affirmed the

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ed. 1985) (setting out the 1983 version of the rule) with *id.* at ¶ 11.01[6] (setting out the current version).

Petitioners' motion was one of three Rule 11 motions filed by several of the defendants. All three motions were denied.

[2] The district court also chastised petitioners' counsel, Marion Edwyn Harrison, for recording a conversation between himself and Mary McLaughlin, counsel for respondents, without her consent. (Harrison had attached the transcript of this conversation to his Rule 11 motion.) The district court suggested that by recording this telephone call Harrison had breached his ethical obligations and may also have violated state law. See 18 Pa.C.S. § 5703 (Purdon 1983). The district court directed that a copy of its opinion describing this conduct be forwarded to the appropriate state bar disciplinary authorities for their review. Pet. App. 10a, 12a.

[3] Chapter 2.D.1 of the Third Circuit's Internal Operating Procedures explains that "judges usually vote to eliminate oral argument * * * [w]here the issue is tightly constrained [and] not

denial of the Rule 11 motion, on the ground that petitioners' motion was untimely under the supervisory rule announced in *Pensiero*. Rehearing and rehearing in banc were denied on March 7, 1990. The instant petition followed.

INTRODUCTION AND SUMMARY OF ARGUMENT

Contrary to petitioners' suggestion, this case does not present any issue with respect to a district court's jurisdiction to hear a Rule 11 motion after a case has been voluntarily dismissed. The decision below thus does not even call into question, much less contravene, this Court's holding in *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447 (1990), that district courts have jurisdiction over Rule 11 motions filed after a voluntary dismissal. Neither, of course, does it conflict with circuit court decisions on the issue resolved by *Cooter & Gell*.

Rather, the decision below is an unexceptional application of the Third Circuit's supervisory rule that Rule 11 motions should be made before the entry of a final judgment, so that appellate review can be accomplished in an efficient and orderly fashion. That rule leaves ample time after dismissal for a dismissed party to move under Rule 11, and therefore does not touch upon the concerns that animated the Court in *Cooter & Gell*.

Moreover, the supervisory rule applied below is a sensible one, well within the power of the court of appeals, and it has been consistently followed by that court. In any event, the district court here *did* consider the merits of petitioners' Rule 11 motion, in spite of its untimeliness, and held in the alternative that the motion was so lacking in merit as to approach misuse of the Rule. Review by this Court is accordingly not warranted.

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novel * * * [or] [w]here the outcome of the appeal is clearly controlled by a decision of the Supreme Court or this court."

ARGUMENT

I. THERE IS NO CONFLICT FOR THIS COURT TO RESOLVE BECAUSE THE DECISION BELOW DOES NOT CALL INTO QUESTION A DISTRICT COURT'S JURISDICTION OVER RULE 11 MOTIONS FILED AFTER A VOLUNTARY DISMISSAL.

There is no conflict between the decision below and the decisions of this Court or other courts of appeals on the question of district court jurisdiction to hear Rule 11 motions after a voluntary dismissal. The court of appeals did not base its affirmance of the denial of petitioners' Rule 11 motion on any lack of jurisdiction in the district court to entertain such motions after a voluntary dismissal. In fact, the decision below says nothing at all about *jurisdiction* to hear Rule 11 motions. Rather, the court below applied the Third Circuit's procedural rule, announced pursuant to its supervisory powers in *Mary Ann Pensiero, Inc.* v. *Lingle*, 847 F.2d 90 (1988), that Rule 11 motions must be made before the entry of *final judgment* in order to facilitate the orderly presentation of appeals. In *Pensiero* itself, the Third Circuit discussed the jurisdictional issue at length and expresly held that district courts *have* jurisdiction to hear a Rule 11 motion not only after a voluntary dismissal but after final judgment has been entered. 847 F.2d at 97-98.

This Court resolved the pre-existing conflict over jurisdiction following voluntary dismissals under Rule 41(a)(2) in *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447 (1990). There the Court held—as the Third Circuit had correctly anticipated in *Pensiero*—that district courts have such jurisdiction. Accordingly, there is no longer a conflict among the circuits on the jurisdictional question. The decisions from other circuits cited by petitioners (at 9) to show this "circuit split" were decided before this Court's resolution of the question in *Cooter & Gell*, and most of them were specifically cited in the *Cooter & Gell* opinion. See 110 S. Ct. at 2455.

While some questions conceivably might remain regarding the application of *Cooter & Gell* to other issues under Rule 41, no such question is presented by this petition. In this case, petitioners had over six weeks between their voluntary dismissal on March 3 and the entry of final judgment on April 18 in which they could have filed their Rule 11 motion.[4] The *Pensiero* rule would not have prevented such a filing. Thus, there is no conflict for the Court to resolve and no need for this Court's attention to any question of jurisdiction after dismissal under the sections of Rule 41 not involved in *Cooter & Gell.*

II. THE AFFIRMANCE OF THE DENIAL OF PETITIONERS' RULE 11 MOTION WAS CORRECT AND PRESENTS NO ISSUE WARRANTING THIS COURT'S REVIEW.

1. As the Third Circuit explained in *Pensiero,* the supervisory rule formulated in that case was the result of the court of appeals' experience with piecemeal appeals. 847 F.2d at 99. Its goal is to ensure that the court of appeals may dispose of appeals on the merits and any Rule 11 issues in a single hearing. *Ibid.*

That action was entirely within the power of the court of appeals. In *Cupp* v. *Naughten,* 414 U.S. 141, 146 (1974), this Court stated that, in "exercising the so-called supervisory power of an appellate court," a court of appeals "may * * * require [the district court] to fol-

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[4] Indeed, counsel for Brown and ALL was aware of the facts he claims gave rise to the Rule 11 violation since even before the case formally began, and he certainly could have filed the motion at any time after respondents filed for voluntary dismissal on February 2, 1989. As the Third Circuit itself explained in *Pensiero,* there is no need in a Rule 11 context like this to wait until the end of the litigation to resolve sanctions issues, as there might be in the context of a remedy like attorney's fees. See 847 F.2d at 98-99. But instead of filing a Rule 11 motion petitioners' counsel merely threatened to do so repeatedly, until well after the entry of final judgment.

low procedures deemed desirable from the viewpoint of sound judicial practice." And in *Abney* v. *United States*, 431 U.S. 651, 662 n.7 (1977), this Court noted specifically that "it is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars" to determine the pace at which appeals are presented and resolved.[5]

More generally, this Court has made clear that the supervisory power of a superior over an inferior court permits the formulation of rules like that promulgated in *Pensiero*. See, *e.g.*, *Thiel* v. *Southern Pac. Co.*, 328 U.S. 217 (1946) (imposing supervisory rule regulating the choice of jury members).[6] Accordingly, the court of appeals had ample power to promulgate the *Pensiero* rule.[7]

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[5] *Cf. Cooter & Gell*, 110 S. Ct. at 2457 (noting that "[d]istrict courts may, of course, 'adopt local rules establishing timeliness standards'" for the filing of Rule 11 motions) (quoting *White* v. *New Hampshire Department of Employment Security*, 455 U.S. 445, 454 (1982)).

[6] This Court has used its own supervisory powers over the lower courts on numerous occasions. See, *e.g.*, *Klapprott* v. *United States*, 335 U.S. 601 (1949); *Thiel*, *supra*.

[7] Exercises of supervisory powers as in *Pensiero* are common among the courts of appeals, particularly to govern the path by which a case makes it way from trial to appellate court. See, *e.g.*, *United States v. Dunbar*, 611 F.2d 985 (5th Cir. 1980) (announcing supervisory rule allowing district courts to maintain jurisdiction and proceed with criminal trial while appeal pending on double jeopardy challenge to indictment); *Provident Bank* v. *Manor Steel Corp.*, 882 F.2d 252 (7th Cir. 1989) (announcing supervisory rule requiring magistrate to inform parties that they must file objections identifying issues to be resolved on appeal within ten days of issuance of magistrate's decision). See generally *United States* v. *Foster*, 469 F.2d 1, 4-5 (1st Cir. 1972) (announcing supervisory rule requiring district courts to warn defendants of the risks of joint representation); *United States* v. *Cheramie*, 520 F.2d 325 (5th Cir. 1975) (acknowledging supervisory power to restrict utilization within the circuit of certain jury instructions even though no constitutional right would be abridged by that instruction's issuance).

Moreover, the rule announced in *Pensiero* is a sensible one. Inasmuch as Rule 11 questions are so often bound up with the merits of the issues in a case, the *Pensiero* rule ensures that review of a case's merits is accomplished simultaneously with review of any decision regarding sanctions. As this case illustrates, without such a rule the courts will continue to be plagued with fragmented appeals.[8] There is no need for this Court to review the wisdom of this particular procedural rule, which the Third Circuit viewed as advisable for the orderly presentation and disposition of appeals.[9]

2. The Third Circuit's own decisions are not inconsistent on the question of jurisdiction over Rule 11 motions. There is no inconsistency at all between *Pensiero* and *Schering Corp.* v. *Vitarine Pharmaceu-*

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[8] In this case, for example, separate appeals were filed by petitioners, on their Rule 11 questions, and by other defendants, on the merits of the summary judgment and permanent injunction rulings. Contrary to petitioners' assertion that the other appeals were "unrelated" to this one, Pet. 7, the court of appeals consolidated the appeals for purposes of disposition.

[9] Petitioners complain that the panel in this case considered itself bound by the panel decision in *Pensiero*. Pet. 11-12. But petitioners offer no argument or authority suggesting any impropriety in this practice, which the courts of appeals regularly and expressly follow. See 1B *Moore's Federal Practice* ¶ 0.402[1], at 19 (footnote omitted) ("[i]n the case of a court that sits in panels, a decision of a panel constitutes a decision of the court and carries the weight of stare decisis in a subsequent case before the same or a different panel"). See, *e.g.*, *Association of Civilian Technicians* v. *Federal Labor Relations Authority*, 756 F.2d 172, 176 (D.C. Cir. 1985); *Jusino* v. *Zayas*, 875 F.2d 986, 993 (1st Cir. 1989); *In re Luma Camera Service*, 157 F.2d 951, 954-955 (2d Cir. 1946); *North Carolina Utilities Comm'n* v. *FCC*, 552 F.2d 1036, 1044 n.8 (4th Cir. 1977); *Ryals* v. *Estelle*, 661 F.2d 904, 906 (5th Cir. 1981); *Conklin* v. *Lovely*, 834 F.2d 543, 549 (6th Cir. 1987); *Dudley* v. *Dittmer*, 795 F.2d 669, 673 (8th Cir. 1986); *Bowe* v. *INS*, 597 F.2d 1158, 1159 n.1 (9th Cir. 1979); *Savage* v. *Cache Valley Dairy Assoc.*, 737 F.2d 887, 889 (10th Cir. 1984); *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1210 (11th Cir. 1981); *Kimberly-Clark Corp.* v. *Fort Howard Paper Co.*, 772 F.2d 860, 863 (Fed. Cir. 1985).

ticals, Inc., 889 F.2d 490 (3d Cir. 1989). Under *Pensiero*, Rule 11 motions must be made before the district court enters final judgment, so that the Third Circuit can resolve the merits and any Rule 11 motions in a single appeal.[10] *Schering*, however, unlike *Pensiero*, involved a Rule 41(a)(1)(i) voluntary dismissal—*i.e.*, one entered before the defendant had answered the complaint or moved for summary judgment. Such a dismissal may be had as of right and requires no order of court. No final judgment is ever entered when a case is disposed of in this way. See 9 C. Wright & A. Miller, *Federal Practice & Procedure* § 2363, at 158-159 (1971 & Supp. 1990).[11]

Moreover, even if such an inconsistency did exist it would not merit this Court's review. The courts within the Third Circuit have consistently followed the *Pensiero* rule since it was announced in 1988.[12] A single stray panel decision deviating from this clear pattern would properly be resolved by the Third Circuit itself, and would not require attention from this Court. The Third Circuit's denial of the petition for rehearing in banc makes clear that that court has heard and rejected petitioner's claim of an inconsistency between the two opinions.

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[10] *Pensiero* does not speak to the power of a district court to impose Rule 11 sanctions *sua sponte* after the entry of final judgment.

[11] Indeed, the district court in *Schering* had not entered a final judgment when the Third Circuit resolved the Rule 11 issue in that case. See 124 F.R.D. 580, 584 (D.N.J. 1989). *Pensiero*'s supervisory rule was thus completely irrelevant in that context.

[12] See, *e.g.*, *Hilmon* v. *Hyatt Int'l*, 899 F.2d 250 (3d Cir. 1990); *Napier* v. *Thirty or More Federal Agents*, 855 F.2d 1080 (3d Cir. 1988); *Muller* v. *Temura Shipping Co.*, 1989 U.S. Dist. LEXIS 8411 (E.D. Pa. July 24, 1989); *ADW, Inc.* v. *Lutheran Social Mission Society*, 1989 U.S. Dist. LEXIS 8408 (E.D. Pa. July 19, 1989); *Mixing Equipment Co.* v. *Innova Tech Inc.*, 9 U.S.P.Q.2d 1057 (E.D. Pa. 1988).

3. Even if there were any basis for concern about the *Pensiero* rule, this would not be an appropriate case in which to consider it because here the district court *did* address the merits of petitioners' Rule 11 motion in spite of its untimeliness. The court concluded that respondents had not been guilty of any impropriety in the conduct of this case and that, indeed, if any abuse had occurred, it was on the part of petitioners. See Pet. App. 10a.[13] Inasmuch as this decision would be reviewed, if at all, only for abuse of discretion, see *Cooter & Gell*, 110 S. Ct. at 2461, the absence of review by the court of appeals is not worthy of this Court's consideration. This case would therefore be a particularly inappropriate vehicle for considering a dismissed party's argument that it was denied consideration of the merits of its motion.

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[13] The record fully supports the district court's ruling. In naming Brown and ALL as defendants, respondents reasonably relied on the fact that they were both listed as "co-sponsors" of Operation Rescue in its brochure. That alone was sufficient to satisfy Rule 11's requirement of "a reasonable investigation of the facts and a normally competent level of legal research to support the presentation." *Pensiero*, 847 F.2d at 94 (quoting *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 157 (3d Cir. 1986)). Hence the district court correctly found that:

> (1) [respondents'] inquiry prior to filing the complaint was reasonable under Rule 11; (2) the dismissal of various defendants pursuant to Fed. R. Civ. P. 41(a)(2) * * * does not indicate that a violation of Rule 11 occurred; (3) the dismissal of certain defendants and certain causes of action does not indicate that a violation of Rule 11 occurred; and (4) none of the other arguments or criticisms of [respondents'] conduct constitute violations of Rule 11. * * * *Some of the arguments advanced by [petitioners'] counsel in the instant motions come dangerously close to constituting * * * misuse of the Rule.*

Pet. App. 10a (emphasis added).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

NANCY J. BREGSTEIN
Counsel of Record
MARY A. MCLAUGHLIN
JEROME M. MARCUS
LORI LOWENTHAL STERN
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 981-2000
Counsel for Respondents

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